

D. Reconsideration of a Case in Supervisory Proceedings

1. Nature of Supervisory Proceedings

Any decision of an arbitrazh court of the Russian Federation may be reconsidered in “supervisory proceedings.” This term refers to the review and reconsideration of a decision or decree by the Higher Arbitrazh Court on the basis of a “protest” against the decision or decree which is made by one of a limited number of authorized persons. There is no right to a review in the supervisory instance, and a decision or decree will be reviewed only if the relevant authorized persons are convinced that the lower court decision or decree is legally incorrect or without basis. The participants in the case, however, may petition the appropriate persons concerning the submission of a protest in the case, setting forth the reasons that they believe the lower court decision to be incorrect. (A sample of such a petition appears as Appendix P to the Handbook.) Determinations of the lower courts on procedural matters may also be reviewed in supervisory proceedings if they are of a type that is generally subject to separate appeal, or if the determination has the effect of preventing the consideration of the corresponding case from continuing.

2. Standing to Submit a Protest

A protest concerning a lower court decree or decision may be submitted by the Chairman of the Higher Arbitrazh Court of the Russian Federation or the Procurator General of the Russian Federation concerning any decision of any arbitrazh court, with the exception of decrees of the Presidium of the Higher Arbitrazh Court. The deputy chairs of the Higher Arbitrazh Court and deputies of the Procurator General of the Russian Federation may submit protests concerning the decisions and decrees of any arbitrazh court, with the exception of decrees of the Presidium of the Higher Arbitrazh Court and decisions of a three-judge panel of the Higher Arbitrazh Court considering a case in the first instance. The Chair of the Higher Arbitrazh Court or one of the deputy chairs may suspend the execution of the corresponding decision during the period in which the protest is being considered. All protests are considered by the Presidium of the Higher Arbitrazh Court of the Russian Federation.

3. Procedure for Consideration; Authority of the Presidium

If one of the persons authorized to bring a protest considers that grounds exist for the protest, that person submits the protest, along with the case record, to the Presidium. In considering the protest, the Presidium hears the report of a judge of the Higher Arbitrazh Court concerning the circumstances of the case and the arguments in the protest, and discusses these issues. The Presidium may also summon participants in the case if clarifications or explanations are required,³ but their failure to appear does not hinder the consideration of the case by the Presidium. The Presidium considers the case in all of its aspects, and may make decisions both on legal issues and on the evidentiary basis for the court's decision in the specific case.

The Presidium issues its decision in the form of a “decree.” It has the authority to:

- leave the decision or decree unchanged;
- reverse the decision or decree in full or in part and send the case for a new consideration;
- amend or reverse the decision or decree and make a new decision without sending the case back for a new consideration;
- reverse the decision or decree and terminate the proceedings in the case or leave the case without consideration, in full or in part; or
- leave one of several earlier issued decisions or decrees in force.

The Presidium is empowered to act if a majority of the members are present, and a decision on a protest is taken by a majority vote of those members who are present when it is considered. The decree on the protest is signed by the Chair of the Higher Arbitrazh Court and enters into force from the time of its issuance. Instructions of the Presidium which are set forth in the decree are binding upon lower courts if the case is sent back for a new consideration. The decree may not, however, establish facts or circumstances that were not considered established by the lower court decisions, nor may it decide questions of the probative value of particular pieces of evidence or state what decision must be made in the new consideration of the case.

³ The language of part 2 of Article 186 of the APC suggests that the Presidium may summon those participants in the case that it considers necessary to its consideration of the case, without notification of the other parties and participants and that it may choose not to involve participants in its consideration of the case. A determination issued by the Constitutional Court of the Russian Federation, however, has stated that the Article may not be applied in this fashion. The Presidium must give the participants in the case the opportunity to be heard in all instances in which its decision effects a change in their rights and obligations. And, without regard to whether the decision changes the rights and obligations of the parties, if any participants in the case are provided such an opportunity, then all participants must be provided an equal right to be heard. See the Determination of the Constitutional Court of the Russian Federation “Concerning the Complaint of the Open Joint Stock Society “NTV Television Company” About the Violation of Constitutional Rights and Freedoms by Part 2 of Article 186 of the Arbitrazh Procedure Code of the Russian Federation,” *reported in* *Sobranie Zakonodatel'stva RF* [Collected Legislation of the Russian Federation], 1999, No. 44, Item 5382.